

CITATION: R. v. Raycroft, 2017 ONSC 6264
COURT FILE NO.: 14-571
DATE: 20171019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
HER MAJESTY THE QUEEN)	<i>Peter Napier</i> , for the Crown
)	
– and –)	
)	
ELMER RAYCROFT)	<i>Rodney Sellar</i> and <i>Jacob Legault</i> , for the
)	Defendant
Defendant)	
)	
)	HEARD at Pembroke: 10-13 and 17
)	October 2017

REASONS FOR DECISION

MEW J. (Orally)

[1] The indictment against Elmer Raycroft contains seven counts of assault or sexual assault on Isabelle Raycroft which are alleged to have occurred between June 2011 and April 2014 during the course of which they cohabited as spouses.

[2] Mr. Raycroft was arrested and charged in April 2014. He was tried on those charges over five days between August and November 2014 in the Ontario Court of Justice. The trial judge reserved her decision but, due to illness, was unable to deliver it herself. Instead, another judge read the decision prepared by the trial judge. Mr. Raycroft was found guilty on six of the seven charges that had been tried.

[3] The judge who had read the original trial judge's reasons then became the sentencing judge. A sentencing hearing was held. The sentencing judge then reviewed the trial transcripts. Having done so, he expressed himself to have a reasonable doubt as to the guilt of Mr. Raycroft. He set aside the guilty verdicts and ordered a new trial.

[4] A subsequent application to this court for an order by way of *certiorari* setting aside that decision was unsuccessful.

[5] Mr. Raycroft then re-elected to be tried by a Superior Court judge sitting without a jury.

[6] A feature of this case which distinguishes it from many cases involving allegations of domestic violence, and particularly allegations of sexual offences, is that there is no order

restricting the publication or reporting of information which might reveal the identity of the complainant or of a witness in this matter. I was informed by counsel that an order imposing reporting restrictions in relation to the previous trial, made pursuant to section 486.4 of the *Criminal Code*, was vacated at the request of the complainant, Isabelle Raycroft.

[7] It is important that I state at the outset, given not only the judicial history of this matter but also the public attention which this case has received following the lifting of reporting restrictions, that the decision of this court on the charges against Mr. Raycroft must be based solely on the evidence which was heard at this trial. What occurred at the previous trial or what has been said in the media about this case or its principal witnesses is of no relevance, save to the extent that it was referred to at this trial.

[8] It is also important to bear in mind that in this, as in any criminal case, a person accused of a crime is presumed innocent. That presumption can only be displaced if the Crown proves the guilt of the accused person beyond a reasonable doubt.

[9] Proof beyond a reasonable doubt does not mean proof to a standard of absolute certainty. But the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt.

[10] Probable or likely guilty is not enough. As Molloy J. recently observed in *R. v. Nyznik*, 2017 ONSC 4392, 2017, at para 7:

If all I can say is that the defendants in this case are likely guilty, I must acquit. It would not be safe to convict someone of a criminal offence with only that degree of confidence. Before I can find the defendants guilty, I must be sure that they committed the offence charged.

[11] To find the Mr. Raycroft guilty on any one or more of the charges that have been laid against him, I must, therefore, consider all of the evidence relevant to each charge that has been admitted at this trial – but only that evidence – and, having done so, be satisfied beyond reasonable doubt that the offence charged has been committed.

[12] The evidence at trial has consisted of the oral testimony given by witnesses as well as certain documents received in evidence and marked as exhibits. There were, as there are in almost all trials, conflicts in the evidence. Inconsistencies. Differences of perspective. Disputes about whether certain events happened at all. The task of the trier of fact – in this case it is the trial judge, but in jury trials it would be the jury – is to decide from the evidence what the facts are. There is no hard and fast method for doing this. Triers of fact are required to consider the evidence as a whole and apply the common sense that they employ every day when deciding whether people know what they are talking about and whether they are telling the truth.

Background

[13] Isabelle and Elmer Raycroft are now both in their late 70s. Their marriage on 21 May 2011 was a second marriage for each of them.

[14] When they met in 2009, Isabelle Raycroft had been single for over 40 years, having divorced her first husband and brought up three daughters by herself.

[15] For five years prior to her retirement at the age of 65, Isabelle Raycroft had worked at the Canadian Food Inspection Agency. At the time that she met the accused in September 2009 through an Internet dating service, she was retired and living on her CPP and a small government pension in a sheltered residence in Richmond.

[16] Elmer Raycroft, by contrast, had been married for 30 days short of 50 years when, on 31 July 2008, his wife succumbed to Amyotrophic Lateral Sclerosis (ALS). He and his former wife had four children together – two girls and two boys.

[17] For much of his working life, Elmer Raycroft sold cars. At one point he owned a Ford dealership. He also had, and lived at, what he described as a “hobby farm” just outside Arnprior.

[18] Isabelle Raycroft and Elmer Raycroft did not live together prior to their marriage.

[19] Shortly before the wedding, at the behest of Elmer Raycroft’s children, they entered into a prenuptial agreement, one of the effects of which was that if they separated, each of them waived and irrevocably released any claims of support by or interest in the assets of the other party.

[20] It would appear - although the evidence at trial on this was limited - that the children of both Elmer Raycroft and Isabelle Raycroft had concerns about the marriage.

[21] After a short honeymoon, the Raycrofts moved into the farmhouse outside Arnprior owned by Mr. Raycroft.

[22] The Raycrofts appear to have been sexually active, at least up until August 2012. However, according to Ms. Raycroft, her husband was in the habit of “goosing” her (i.e. grabbing her buttocks from behind when she was not expecting it). She strongly objected to this.

[23] The alleged offences occurred over the ensuing 20 months or so. Two charges of assault arise from Mr. Raycroft allegedly throwing objects – an alarm clock on one occasion and a mug on another – at Ms. Raycroft. Two more assault charges arise from incidents said to have involved the use of a pillow and a belt. Three charges of sexual assault arise from incidents in which it is alleged that on two separate occasions Mr. Raycroft attempted to inspect Ms. Raycroft’s vagina for evidence of the presence of semen; that he repeatedly placed, or attempted to place, his hand on Ms. Raycroft’s pelvic area when they were driving in the car; and, that he had penetrative vaginal intercourse on the sofa in their residence which Ms. Raycroft did not consent to.

[24] There is a further allegation of sexual assault, involving non-consensual intercourse, which is said to have occurred during the first six months of the Raycrofts’ marriage. It was not reported to the police until 22 June 2017 and does not form the basis for any of the charges presently before the court.

[25] There was also an incident in Florida in December 2012, in which there was involvement of local police, but which did not give rise to any charges.

[26] In July 2012, Elmer Raycroft was diagnosed with prostate cancer. As a result of the treatment undertaken for that condition, sexual activity between the Raycrofts ceased in August 2012.

[27] On 8 April 2014, Ms. Raycroft left Mr. Raycroft for the last time. She made statements to the police on 8 April 2014 and 26 May 2014. Mr. Raycroft was arrested and charged.

[28] On 9 May 2014, Isabelle Raycroft commenced proceedings in the Superior Court of Justice Family Court Branch seeking spousal support, equalisation of net family properties and a restraining/non-harassment order. In that proceeding she alleges that she signed a prenuptial agreement which did not reflect her wishes and the consequences of which were neither explained nor understood by her. She also alleges that soon after the marriage, Mr. Raycroft exhibited controlling behaviour, both physically and emotionally abusive. Following the findings of guilt at the first trial, Ms. Raycroft's application was amended to plead details of the assaults and sexual assaults addressed in the criminal proceedings and adding a claim for damages of \$200,000 to the other relief sought by her. That proceeding remains extant.

[29] Mr. Raycroft denies that any of the incidents which give rise to the charges against him actually occurred. Furthermore, he alleges that on a number of occasions Ms. Raycroft physically attacked him.

[30] The evidence at trial consisted principally of the testimony of Isabelle Raycroft and Elmer Raycroft. There was, however, reference to a number of other sources, including transcripts of interviews given by them to the police (three interviews with Ms. Raycroft and one with Mr. Raycroft). Also referred to were a two-page typed note, the first heading of which is "Life Before Elmer", prepared by Ms. Raycroft; a four-page document entitled "Response to Elmer's Trial Transcript" and a 14 page table containing commentary on trial evidence, both of which were prepared by Ms. Raycroft and her daughters to assist the Crown; and, a two-page typed "Schedule of Abuse" prepared by Ms. Raycroft which, she explained, is all that remains of a far more extensive diary that she kept (she says that the rest of it was deleted after the first trial).

[31] The divergent accounts given by Isabelle Raycroft and Elmer Raycroft necessarily result in the court having to assess their credibility. This engages the analytical process enunciated by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 SCR 742 which, applied to this case, requires me to ask and answer these questions:

1. Do I believe Elmer Raycroft's evidence? If I do, I must acquit him.
2. If I do not believe the evidence of Mr. Raycroft, but I am left in reasonable doubt by it, I must acquit him.

3. Even if I am not left in doubt by Mr. Raycroft's testimony, am I convinced beyond a reasonable doubt of the guilt of Mr. Raycroft on the basis of the evidence which I do accept?

The Evidence

[32] I will deal first with incidents which did not form the basis for any of the charges against Mr. Raycroft, but which were referred to during the course of the evidence given at trial, and which, consequently, do form part of the overall narrative.

[33] According to Ms. Raycroft, there were two incidents early on in the marriage which were a portent of things to come.

Water Throwing

[34] One Saturday, Mr. Raycroft wanted his wife to accompany him on a trip to Bancroft to visit his grandchildren for a graduation ceremony. Ms. Raycroft did not want to go. As her husband walked by her in the kitchen he flipped water from a cup in her face.

Tipping

[35] On another occasion, also before the Bancroft trip, Ms. Raycroft alleges that after her husband had been yelling at her all day, it got to bed time and he asked her to come to bed. She was sitting on a sofa in the living room. She wanted to be left alone. She says that Mr. Raycroft tipped her off the sofa and then tipped her off a wing back chair that she had moved to, resulting in her injuring her knees.

Ms. Raycroft Leaves for the First Time

[36] Both of the events just described had occurred before Ms. Raycroft went to the police for the first time on 28 June 2011. That day, Mr. Raycroft had asked his wife to accompany him to a family member's graduation ceremony in Bancroft, which I have already mentioned. She did not want to go. So Mr. Raycroft went alone. Ms. Raycroft claims that her husband took her car keys with him so that she could not go anywhere. As he left the house, she claims that he turned the heat to 30 degrees (it was summer). She claims that while he was gone, she called Mr. Raycroft's now deceased brother-in-law, who came over and that she told him everything that was happening. In her words "I was living with a narcissistic abuser and I wasn't prepared for it". She says that she wanted to leave that day. She packed a bag. When Mr. Raycroft returned from Bancroft she told him she was leaving him and drove off in her car.

[37] Mr. Raycroft acknowledges that he was unhappy that his wife would not accompany him to Bancroft. He says that he had suggested to her that she could come with him and they could stay overnight at a hotel and have a nice dinner. He says that he told her that he wouldn't "require" her to attend the graduation, remarking that there had been a "previous altercation". He decided to go on his own when his wife maintained her refusal.

[38] When he got back at about 4:15 PM on 28 June, Mr. Raycroft found his wife still at the house, very angry. According to Mr. Raycroft, his wife said that he had “disobeyed” her, that she was leaving and that if he wanted to discuss the situation with her, she was going to Tim Horton’s.

[39] In fact Ms. Raycroft went to the OPP in Arnprior. Mr. Raycroft saw her car parked in the OPP parking lot when, according to him, he was en route to Tim Horton’s to speak with her.

[40] Ms. Raycroft says that she told the police that she was being abused by her husband. She said during the course of her cross-examination that by the time she went to the police, there was a little bruise on her arm resulting from a struggle over her suitcase. One of the officers saw the bruise on her arm: she told the police she had bumped into a dresser. No formal statements were taken and no charges were laid. There is no written record of who said what to whom. Nevertheless, a report of some sort was made by the police at the time. From that, while it would appear that the police knew that Mr. Raycroft had been upset that his wife had not accompanied him to Bancroft, it was recorded that there had been “no physical violence”.

[41] When asked about this, Ms. Raycroft speculated that maybe the police were asking her whether Mr. Raycroft had used his fists on her. On a number of occasions during the course of her evidence she said that she did not tell the police about any physical violence. Yet when pressed she said that she might have told the police that she had had a glass of water thrown at her. When it was put to her that the police are required to investigate any circumstances of domestic violence, that they had asked her whether there had been violence and she had said “no”, Ms. Raycroft answered that that was her prerogative. A little later she explained that she was not the first woman who had gone to the police to get help. The police had provided that help. She speculated that maybe they came to the conclusion of “no physical violence” on their own. Or maybe she had thought that the police were asking her whether her husband had used his fists on her.

[42] Ultimately, Ms. Raycroft explained that she did not intend the police to do anything for her. Her primary concern at that time was that she had left her medication behind at the farmhouse and wanted to get it retrieved. She asserted that she was being truthful even though she acknowledged that she was holding back things that she did not want to share with the police at that time.

[43] Ms. Raycroft’s bag or bags had not in fact been in her car when she went to the Arnprior OPP. It was Mr. Raycroft, who had come to the police station after seeing his wife’s car parked there who, at the request of the police, went back to the house and fetched her bag.

[44] After the police station, Ms. Raycroft went to her daughter Janet’s home and stayed there overnight. The next day there was a follow-up call from the OPP as a result of which Ms. Raycroft went into the OPP detachment at Kanata. She says that she provided a statement. She told the police what had happened. She told them that there had been physical violence. Whatever statement was made, it cannot be produced. The OPP no longer have it. There is no explanation for its disappearance. However reference to a statement is made in an internal OPP email which was produced at trial and which indicates that Ms. Raycroft was also invited to

provide a video statement, which she declined to do. Ms. Raycroft confirms that she did not want to give a video statement.

[45] The email also discloses that, having been told by an officer that there appeared to be reasonable grounds that an assault had taken place and that she had been injured by her husband, Ms. Raycroft mentioned that she had a sore knee. When asked to elaborate on this, she declined to do so. Ms. Raycroft then retracted the statement that she had already made. Her daughter Janet Turner was apparently with her when she did this. The police decided to take no further action at that time.

[46] It is to say the least unfortunate that the statement which was made to the OPP on 29 June 2011 is no longer available. This is particularly so in a case such as this, where there is relatively little evidence to corroborate the oral testimony of the two principal witnesses.

[47] After spending two or three nights at her daughter Janet's, Isabelle Raycroft returned to the matrimonial home.

Florida

[48] The Florida incident occurred on 19 December 2012. They were staying at their holiday home there. Ms. Raycroft reported to local police that for the past few weeks her husband had been verbally abusive to her calling her names and such and that he pushed her as she was walking up the stairs to their vacation residence, causing a bruise on her left leg.

[49] During the course of her evidence at trial, Ms. Raycroft described having been dragged up the steps to their holiday home by her husband after he had come home from a dinner with his group of friends, who she referred to as his "cult". She said at trial that he had come charging in "yelling and foaming at the mouth". When pressed, she quickly acknowledged this was an embellishment and that Mr. Raycroft had not actually been foaming at the mouth. Nevertheless, she claims that as a result of being dragged up the steps there were scratches on her legs and that the female police officer she subsequently spoke to had seen those scratches. She also said that Mr. Raycroft had taken away her ATM card and the GPS.

[50] The next day the police attended. An officer spoke to Mr. Raycroft who "remained extremely calm" and said that Ms. Raycroft had tripped as she was walking up the steps the previous day and hit her leg. He did acknowledge having taken her ATM card and GPS from the car because she had continuously shopped since they arrived from Ontario for their holiday.

[51] The officers offered to arrange for Ms. Raycroft to go to a shelter if she did not feel safe with her husband. According to the police report Ms. Raycroft said that her husband had "never threatened her in any way and had primarily just insulted her and called her stupid". Asked about the statement at trial, Ms. Raycroft explained that her use of the phrase "never threatened" would have been made in the context of that particular incident, not more generally. She was unable to reconcile this statement with the physical abuse which she claimed had been applied to her the previous day.

Recently Disclosed Sexual Assault

[52] As already alluded to, on 22 June 2017, which happens to have been the date of a judicial pretrial in this matter, Ms. Raycroft attended a further interview with the OPP in which she described an incident, said to have occurred during the first six months of the marriage, when Mr. Raycroft “raped” her. As this incident is not presently the subject of a charge before a court I will limit what I say about it. Suffice it to say that the allegation is that the incident occurred at around 8 AM one morning in the Raycroft’s bedroom. Mr. Raycroft emerged from the bathroom, naked and erect and flipped her over and entered her from the back in her vagina, but at an angle that was painful. She claims that the sex was non-consensual. However, she says that on two subsequent occasions she and her husband had consensual sex in a similar, but more comfortable, position. She says that she agreed to this because her husband really liked it.

[53] Mr. Raycroft denies ever having had sex with his wife by entering her from behind, whether consensually or otherwise.

[54] I now turn to those incidents which are the subject of the charges against Mr. Raycroft. I do so in the order in which those incidents are covered by the counts on the indictment.

The Pillow (Count 1)

[55] The allegation is that Mr. Raycroft put a small pink pillow over Isabelle Raycroft’s face at least five if not 10 times. The first time this happened she was sitting on the sofa. She was taken by surprise. He said it was a joke. He would hold the pillow for a few seconds until she started to wiggle. He would do a similar thing in the bedroom. He once explained his actions by telling Ms. Raycroft that his brothers used to gang up on him when he was a child and covered him with pillows and comforters and that he would then have to fight his way out. After a while, Ms. Raycroft says that she became wary of this behaviour and removed decorative pillows from the bed.

[56] Mr. Raycroft denies that these incidents occurred. He denies that when he was a child he had been attacked by or played with pillows with his brothers.

[57] On behalf of the defence it was submitted that the story of childhood pillow fights recounted by Ms. Raycroft was a fiction.

The Belt (Count 2)

[58] This incident occurred one evening in the kitchen. Ms. Raycroft had already undressed in preparation for bed and was sitting in a singlet playing a game on the computer. Her back was to the bedroom. All of a sudden she felt a belt against her neck and her shoulders were pinned back against the chair. She asked Mr. Raycroft what he was doing. She says that he responded “I could lop your head off”.

[59] The incident lasted about 15 seconds. It would have occurred in the summer of 2012 or 2013. There were no other witnesses to it. Ms. Raycroft claims that she told her daughter Sharon about it although acknowledged that she had not mentioned this at the last trial or in any of the documents that she had prepared to assist the police and the prosecution.

[60] Mr. Raycroft denies that this incident ever occurred

The Physical Check (Count 3)

[61] It is alleged that at the end of a day spent visiting Kingston to watch a university football match, Mr. Raycroft committed a sexual assault when he attempted to inspect his wife's vagina for signs of sexual activity.

[62] It is not disputed that, on 21 October 2012, the Raycrofts were in Kingston to watch a football match between the Toronto and Queen's University teams. One of Mr. Raycroft's grandsons was playing for Toronto. The Raycrofts joined Elmer Raycroft's son and daughter-in-law at the Richardson Stadium to watch the game. At half time, Ms. Raycroft returned to the car and spent the rest of the game in the car while Mr. Raycroft remained in the stands to watch the balance of the game.

[63] Mr. Raycroft and Ms. Raycroft have different recollections of where they were prior to the game. Mr. Raycroft says that they had travelled to Watertown in New York State the day before in Ms. Raycroft's car. They had purchased some new tires for the car and had stayed overnight in Watertown before proceeding on to Kingston.

[64] Ms. Raycroft says that they took a day trip to Kingston in her husband's car.

[65] While Ms. Raycroft does recall a trip to Watertown to buy tires for her car and to do some shopping, she believes it was a separate trip. She has a recollection of experiencing a flat tire on a back road in the mountains on the way back from Watertown. She cannot recall where that event occurred nor which mountains they were in.

[66] There are quite different accounts of what happened after Ms. Raycroft decided she wanted to go to the car at half time. She says that as she walked towards the car, three or four young men entered the stadium. One of them approached her and said "I am going to hug you". Ms. Raycroft, who smelt alcohol on this man's breath, momentarily froze. He gave her a quick hug and moved on. Ms. Raycroft said that her "strategy was not to make a commotion". Instead, she went on her way to the car without further incident.

[67] Ms. Raycroft described the hugging incident as "kind of funny". She says that she used this term to mean "strange" rather than "amusing".

[68] It is not disputed that after the game Elmer Raycroft came back to the car and after they had said goodbye to his son, grandson and daughter-in-law, Mr. and Ms. Raycroft started on their way back to Arnprior.

[69] Ms. Raycroft then told her husband about the "hug" incident. According to her, "World War Three" broke out immediately. Mr. Raycroft accused her of having left the football game in order to meet someone. Ms. Raycroft describes her husband's reaction as "irrational". He harangued her the whole way home. After they arrived, they had supper. They were going to bed when Mr. Raycroft asked "aren't you going to take a shower and wash off the semen"? Then he

tried to pry apart her legs saying that he was going to check her for semen. She fought him off and he desisted.

[70] Mr. Raycroft said that his wife had told him at the end of the football game that someone had come up to her and hugged her. She had a smile on her face when she told him this. Mr. Raycroft did not believe that any such incident occurred. At this trial he claimed that he had walked with her to the car at half time and that no one had approached them. This was different to what he said at the first trial where he said that Ms. Raycroft had gone back to the car on her own. But he explained that his recollection had been refreshed after discussion with his son and daughter-in-law. He added that the car could be seen from the stand that he was sitting in. He even claimed the he could see Ms. Raycroft sitting in the car. However he also acknowledged that his focus was on the game. In any event, Mr. Raycroft said that he did not see anyone approach the car while Ms. Raycroft was in it.

[71] According to Mr. Raycroft, the return journey to Arnprior was uneventful. There was no argument or altercation. He vehemently denies that he checked his wife's vagina for signs of sexual activity.

[72] This event was one of three recorded on the "Schedule of Abuse" document prepared by Ms. Raycroft. In that document she notes that her legs and wrists were bruised as a result of Mr. Raycroft's attack on her. The next morning they woke up, had breakfast and went to church together as if nothing had happened.

[73] Ms. Raycroft did not tell anyone else about this incident until the second police interview on 26 May 2014.

The Alarm Clock (Count 4)

[74] Mr. Raycroft allegedly threw an alarm clock at Ms. Raycroft. But, she says, it missed her and hit a wall on the staircase of their home leaving a visible indentation. She believes, but cannot be certain, that the incident occurred in September 2013. She had come into the living room where her husband was. He was standing up holding some blankets. The alarm clock was beside him. He told her to hurry up and get dressed as they had to go "somewhere". Ms. Raycroft said that she said that she did not feel well and did not want to go out. As she turned, she felt the clock go by her inches from her head. She did not actually see him throw it. It ended up hitting a peninsula in the kitchen before rolling on the floor and ending up near the kitchen sink.

[75] Ms. Raycroft had previously claimed that the alarm clock did not work again after this incident but conceded, when presented with evidence that it still works, that she could be mistaken about this. She acknowledged that she had never checked the clock after the incident and that she had been wrong to inform the Crown that it no longer worked. With, perhaps, a hint of sarcasm in her tone, she said of that "I was mistaken and I did a bad thing there".

[76] Mr. Raycroft recalled an incident when he dropped the alarm clock while moving it, along with a comforter. However he denies that the incident described by Ms. Raycroft happened.

[77] The alarm clock was produced and marked as an exhibit. One of its legs is loose and there are two minor dents on the rim. Its plastic face is intact. And, as already mentioned, it continues to work. Both Mr. Raycroft and Ms. Raycroft acknowledged that the alarm clock, which usually resided in their bedroom, had been dropped from a bedside table countless times previously.

The Coffee Mug (Count 5)

[78] The Raycrofts had just returned from what turned out to be their last trip to Florida when Mr. Raycroft allegedly threw a coffee mug at his wife. It happened on 5 April 2014. Mr. Raycroft was going to Barrie, where his son was taking over a new church. Ms. Raycroft had strep throat and said that she was too sick to accompany him. He was standing in the living room. She was at the foot of the stairs. She says that Mr. Raycroft threw a coffee mug at her. It just missed her and hit the wall on the staircase, making an indentation. When he threw it, Mr. Raycroft allegedly said to her “if you don’t come with me, I’ll break everything in the house”.

[79] After the incident, Ms. Raycroft says that she agreed to accompany her husband to church. As soon as she agreed to do so, Ms. Raycroft says that it was as if a light bulb had gone on in her husband’s head. He was as happy as if nothing had happened.

[80] There was considerable discussion at trial, both in the questioning of witnesses and the subsequent submissions of counsel, as to whether an indentation shown in photographs that were filed as exhibits was made by the coffee cup. Ms. Raycroft attempted to explain, somewhat unconvincingly, how the unique shape of the handle on the coffee mug could have made a rectangular indentation. Mr. Raycroft suggested that the indentation had been made by a bed frame which was being moved by his niece down the stairs. There was also speculation as to whether the mark on the wall, which was slightly below the level of the banister, could have been made by a projectile thrown in the manner suggested by Ms. Raycroft. The mug would clearly have been too big to go through the spindles of the banister. The Crown propounded the theory that a man of Mr. Raycroft’s height, throwing a coffee cup over arm, could have achieved such a result.

[81] Mr. Raycroft denies that a mug matching the description given by Ms. Raycroft was ever part of the home’s inventory. Ms. Raycroft said that the mug was part of a set of four which she had brought to the house when she moved in.

[82] Whatever else may or may not have happened, the mark on the wall of the stairway does not assist me in determining whether a mug was thrown at Ms. Raycroft by her husband or not.

[83] From the perspective of Ms. Raycroft, this incident was the last one prior to her decision to leave the marriage for once and all.

Assaults in Vehicle (Count 6)

[84] During their frequent car journeys, Ms. Raycroft claims that her husband was in the habit of placing his hand over her pelvic area while he was driving. She told the police that this had happened as much as 150 times over three years. If she moved his hand away, he would desist.

Once she realised that this behaviour was going to persist, she developed the strategy of placing her purse on her lap so that he no longer had access to her pelvic area. This strategy was effective.

[85] Although there is no record of it, at trial Ms. Raycroft said that that she told the OPP in Kanata about this behaviour in June 2011 when she first reported being abused by Mr. Raycroft. She was vigorously challenged on this statement, which she had not made at the previous trial. It was suggested to her that if she had made allegations of a sexual nature in June 2011 that there would have been consequences. In the face of this challenge, Ms. Raycroft suggested that perhaps the OPP had been an error in not making reference to these assaults in the email narrative which was filed as an exhibit at trial.

[86] Mr. Raycroft denies behaving in the manner alleged. He said that Ms. Raycroft would sometimes take his hand and place it on her knee while they were driving. He denies ever having placed his hand over her vagina or having touched her in a sexual way while driving.

[87] One must surely wonder whether it really took 150 attempts by Mr. Raycroft to place his hand over his wife's pelvic area in the manner described before she clued in to his scheme and implemented her response.

Other Sexual Assaults (Count 7)

[88] An incident of sexual intercourse on a sofa and a second episode in which Mr. Raycroft is said to have attempted to inspect Ms. Raycroft's vagina form the basis for the seventh count.

[89] One evening Ms. Raycroft was lying on the couch in the living room reading a book. She had lost track of what her husband was doing or where he was but at some point became aware of him standing in front of her with his hand in front of his "privates". She could not see his penis. She speculated that he may have gone and taken a Viagra tablet. She said to him "no I don't want to do this". Despite this, she says, he spread her legs and pushed her aside. He got his knee between her legs, removed the blanket which had been on top of her, removed her pyjamas and penetrated her with his penis. After he had finished, Ms. Raycroft believes that he went to the bathroom. When he came back she told him that he had raped her. She claims that he replied "no I didn't, you moved". Ms. Raycroft described the whole thing as "robotic". Mr. Raycroft had a grin on his face when he came back from the bathroom and sat down.

[90] Mr. Raycroft denies that this incident occurred. He initially said that he never had sex with Ms. Raycroft on the couch. When challenged during cross-examination with a less equivocal answer given by him at the previous trial, Mr. Raycroft said that he did have sex with Isabelle Raycroft in her apartment prior to their marriage, but maintained that he never had sex or contact of a sexual nature with her on the couch at the farmhouse.

[91] The other incident occurred on a summer day – Ms. Raycroft believes it was in 2011 - she had come home from somewhere. In her evidence in chief at trial she said she could not remember where she had been, but when cross-examined she said she had been shopping. She was walking around the house, taking off her clothes, with the intention of having a shower. She

was down to her bra and underwear. Mr. Raycroft came in, asked her why she was going to take a shower - she said because she was hot – he then pushed her back onto the bed and said he was going to check her for semen. Ms. Raycroft says that she held onto her underwear, using her hands and legs, and eventually he stopped. During the course of this she caught her middle finger in his belt buckle. It was sore for a long time. She recalls screaming “stop it” at him while the incident was happening.

[92] As already noted, Mr. Raycroft denies that he ever attempted to inspect Ms. Raycroft’s vagina.

Post-Charge Conduct

[93] Mr. Raycroft was arrested on 11 April 2014. He was told that he was not to contact Ms. Raycroft and she was told that she should not contact him. He complied with that instruction. She did not.

[94] In late April, Ms. Raycroft called her husband because she wanted to get her T4 slips which she believed had been mailed to the farmhouse. During the course of that conversation she claims that he apologised to her. Asked why she had never told anyone this previously, she said that she had never been asked the question before.

[95] Another time, Ms. Raycroft was in the car and heard a song come on the radio. It was a song that was meaningful to her relationship with Mr. Raycroft. She telephoned him and sang to him. She says that she cried and he cried.

[96] In a third telephone conversation, acknowledged by her, Ms. Raycroft called Mr. Raycroft and asked him why he didn’t plead guilty.

[97] Around this time she also put a note on a bank statement which she forwarded to Mr. Raycroft saying “make a plea deal. Also: will cost you less fees \$ for court time”. She denied that her motivation for doing this was because she did not want to go to court. She explained that she was just a woman who was worried about a man she used to love. She also denied that she was concerned that all of her husband’s assets would be eaten up by legal fees, leaving nothing for her if she was successful in the family law case.

[98] Not surprisingly, as a result of her behaviour, Ms. Raycroft was charged with aiding and abetting a breach of reconnaissance. She had to sign a peace bond. In her words, “I got into a lot of trouble”. She explained that she had not initially understood the gravity of her actions in making contact, commenting that women sometimes go back to their abusive husbands. She has not, however, contacted Mr. Raycroft since she entered into the peace bond.

[99] Mr. Raycroft testified that approximately six months ago he found a document on a computer that he was about to dispose of which, he suggested should lead me to doubt Mrs. Raycroft’s truthfulness. She had testified, with considerable vigour, that none of her children were interested in coming near the farmhouse. However, the document discovered by Mr. Raycroft, appears to be an itinerary with contact information relating to the 2011 Florida trip by

the Raycrofts, and prepared for one of Ms. Raycroft's daughters. It contains the following paragraph:

(Unknown to Elmer, I am leaving a key to the front door under an empty Flower pot) In Case you want to come down & snoop around. Elmer does not know about this key. If you should bump into Bruce (who is super nice) tell him I gave you a front door key.

[100] Rather than save this document, or print it, or otherwise reproduce it, all of which Mr. Raycroft claims he is technically incapable of doing, he took a photograph of the screen of his computer – effectively a screenshot.

[101] Ms. Raycroft was unable to identify the document when shown the screenshot. She acknowledged that the itinerary information was the sort of thing she might have provided to her daughter but disavowed having written anything like the above quoted paragraph.

[102] I find this evidence unreliable. In the absence of better evidence, in the form of the computer file or some other explanation, I attach no weight to it. Indeed, I would not rule out the possibility that this document was fabricated by someone other than Ms. Raycroft

Observations

[103] The allegations in this case are deeply personal. Giving evidence at a trial can be challenging and traumatic at the best of times, let alone in a case involving allegations of domestic and sexual abuse between spouses.

[104] Added to this, the complainant and the accused in this case have now gone through two trials.

[105] Having regard to the evidence as a whole includes observing and considering such things as the demeanour of a witness, the tenor and tone of the questioner and the witness, the nature of the subject matter, the discomfort which witnesses often feel in the unnatural and intimidating environment of the courtroom, and a multitude of other factors which bear on the weighing and assessing of evidence with the goal of making findings of fact.

[106] Perhaps not surprisingly, Ms. Raycroft displayed a variety of emotions during the course of her testimony: they included anger, indignation, distress, and confusion to name but some. There were also lighter moments.

[107] Although her demeanour was respectful, there were times when, when pressed on an inconsistency or something that may not have made sense, Ms. Raycroft became defensive or even argumentative. On a number of occasions she would justify an inability to explain events or actions on the basis of post-traumatic stress or distress, despite there being no evidence before the court of any formal diagnosis of such condition.

[108] There were also inconsistencies which went beyond what might be expected. An example of the sort of thing I am talking about would be what she said about the farmhouse that

she lived in with Mr. Raycroft for three years. Early in the course of her cross-examination she acknowledged that she knew early on in the marriage that Mr. Raycroft would never sell the farm. She said that she accepted that and that she “worked like a dog to fix up that house”. In her words “I loved the farm”.

[109] Yet later on she described it as “a sad little abusive house with a very abusive husband and father in there” and as “neglected”.

[110] Another example arises from the fact that the wing-backed chair which featured in the tipping incident was no longer in the house at the time the incident is said to have occurred, having been given to Mr. Raycroft’s nephew.

[111] These qualities and observations did detracted from the force and effect of her evidence as I considered it.

[112] Mr. Raycroft appears to be comfortable in the role of giving evidence. Again, this was not surprising. He has many years of experience as a municipal politician, a community activist and a member of numerous committees and boards. He has a physical presence which exudes a degree of confidence. He maintained a calm and responsive demeanour throughout his testimony.

[113] For the reasons already given, however, I do have concerns about the screenshot document which he produced. I found his explanation for failing to produce better evidence of the document he found on his computer unconvincing.

Analysis

[114] The trial of charges which include domestic violence and sexual abuse often comes down to the word of one person against the other — the classic “he said/she said” scenario. The *W.(D.)* instruction provided by the Supreme Court of Canada militates against turning the fact-finding exercise into a credibility contest between the complainant and the accused. Instead, as Molloy J. explained in *Nyznik*, at para 15:

[15] Typically, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. Reliability has to do with the accuracy of a witness’ evidence — whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. Credibility has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt.

[115] Continuing at paragraph 16 of her decision in *Nyznik*, Molloy J. states as follows:

[16] It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

[116] The first step in the *W.(D)*. analysis requires an evaluation of an accused's evidence in the context of all of the evidence, rather than in isolation. As stated by Doherty J.A. in *R. v. J.J.R.D* (2006), 215 C.C.C. (3d) 252 at para. 53 (Ont. C.A.):

An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[117] The Crown argued that I should accept Ms. Raycroft's evidence in relation to each of the charges because it makes sense to do so. If I were minded to take such an approach it would be open to me, on the strength of *R. v. J.J.R.D*, to reject conflicting evidence from Mr. Raycroft and find him guilty beyond a reasonable doubt.

[118] I do not find myself able to take that approach in this case. The danger of doing so was discussed by the Court of Appeal in *R. v. Wills*, 2016 ONCA 965, where the Court wrote, at paras. 17-18:

... On appeal, relying on *D. (J.J.R.)*, the Crown argues that the trial judge's reasoned acceptance of the complainants' evidence justified his rejection of the appellant's evidence.

15 We do not accept this argument. The "reasoned acceptance of a complainant's evidence" that would justify the rejection of the evidence of an accused must occur in the context of a proper consideration of the whole of the evidence. For example, in *R. v. D. (R.)*, 2016 ONCA 574, 30 C.R. (7th) 373 (Ont. C.A.), at paras. 19-20, Laskin J.A. noted:

In *J.J.R.D.* . . . [t]he accused's denial in that case, when "stacked beside" the complainant's evidence and her diary entries, "did not leave the trial judge with a reasonable doubt." And so Doherty J.A. explained that "an outright rejection of an accused's evidence" may be "based on a considered and reasoned acceptance *beyond a reasonable doubt* of the truth of conflicting credible evidence . . . " (emphasis added). In doing so, he addressed the need for the trial judge to be convinced that the conflicting credible evidence established the accused's guilt beyond a reasonable doubt.

The burden of proof point: a trial judge who says only "I reject the accused's evidence because I accept the complainant's evidence" risks being held by an appellate court to have chosen which of the two parties to believe and failed to determine whether, on all the evidence, the accused's guilt had been proved beyond a reasonable doubt. [Emphasis added.]

[119] As the observations I have already made indicate, Ms. Raycroft's evidence raised questions and concerns which, of necessity, preclude a wholesale acceptance of it. That is not to say that there are not parts of Ms. Raycroft's evidence which I do accept, despite Mr. Raycroft's evidence to the contrary. For example, I accept her evidence that she was hugged by a stranger at the Queen's football game. But, contrary to what the Crown urged upon me, it does not necessarily follow as a result that I also must accept her evidence of what happened later that evening when Mr. Raycroft is said to have sexually assaulted the complainant.

[120] One of those questions which arise from the overall context is the extent to which the ongoing family law proceedings might be affecting the evidence given by Ms. Raycroft. The defence suggests that the possibility of having the prenuptial agreement set aside provides an explanation for some of her testimony: after the findings of guilt at the first trial, Ms. Raycroft's application was quickly amended to plead extensive particulars of the assaults and sexual assaults perpetrated by Mr. Raycroft, based upon the criminal charges.

[121] Ms. Raycroft was reluctant to acknowledge any link between the outcome of these proceedings and her family law case. Indeed, she said that she did not know whether the family law case was still active. This was an unnecessarily disingenuous response. Not only were amendments to her application made in July 2015, there was evidence of a case conference having taken place as recently as 2 March 2016. There was no reason for her not to have been straight about the family law proceedings. It would surprise no one that the family law proceedings were being held in abeyance pending the outcome of this trial. Instead, Ms. Raycroft's evasiveness gives some credence to the suggestion by the defence that she has a motive for not telling the truth.

[122] On the other hand, the defence also attempted to make hay out of the fact that Ms. Raycroft and her daughters had put forward their own proposals for what the prenuptial agreement should contain. Although, again, Ms. Raycroft was unnecessarily defensive and evasive at first, it eventually became clear that all she and her daughters had done was respond to a suggestion made by Mr. Raycroft's own lawyer to consider what might be contained in such an agreement.

[123] The defence also challenges the reliability of Ms. Raycroft's evidence because of her tendency, when pressed on matters of detail, to not be specific. I do not share that concern. Quite apart from the fact that some of the events in question occurred more than six years ago, the fact that a witness may not be able to remember details or to accurately pinpoint times and dates will not necessarily undermine the effect of that witness's evidence. This is even more so when the evidence relates to matters on the periphery, rather than at the core, of the issues which a court has to determine.

[124] I was also invited by the defence to attach great weight to the fact that, despite multiple opportunities to do so, the authorities have no record of Ms. Raycroft having made allegations of violence until April 2014 and of sexual violence until May 2014. While there was no expert evidence to explain this, one does not have to have spent a great deal of time in the criminal courts to know that individuals will sometimes tolerate abusive situations for long periods of time before telling anyone, let alone a law enforcement agent. So while I take note of that submission, I place it in the context of the evidence as a whole and, as such, attach some but not significant weight to the lack of contemporaneous complaints on the part of Ms. Raycroft.

[125] More troubling, however, was her insistence that she had been truthful in her dealings with the police when she had in fact been less than forthright.

[126] A further submission by the defence is that the loss of the statement made by Ms. Raycroft on 29 June 2011 to the OPP has prejudiced Mr. Raycroft's ability to make full answer and defence to the charges against him. While it is acknowledged that the loss of this evidence may not rise to the level of a breach of the defendant's rights under section 7 of the *Charter*, I am urged to conclude that the lost evidence could give rise to a reasonable doubt about Mr. Raycroft's guilt: *R. v. Sheng*, 2010 ONCA 296, at para. 63.

[127] The first limb of the W.(D.) analysis requires me to determine whether I accept the defendant's evidence which, essentially, is that none of the things alleged to have occurred in fact happened. Ms. Raycroft's evidence forms part of the context in which I have to make that determination.

[128] I do have concerns about aspects of Mr. Raycroft's evidence. I found his admission that he was "obsessed" with his wife disquieting. I noted that he used phrases – such as "I did not require her to attend" – which I would associate with a controlling attitude on his part. It seems to me likely that he was frustrated by his new wife's lack of cooperation when she declined to go where he wanted to go when he wanted to go. It would not be unusual for two people set in their own ways and routines for many years to encounter difficulties when they embarked on cohabitation. And, no doubt, there were pressures and sensitivities resulting from the negative

attitude of the Raycroft's children towards the marriage. The marriage was clearly not a happy one from the outset, and Mr. Raycroft would have played his part in that.

[129] Mr. Raycroft too, had shifted parts of his account from what had been said at the previous trial. The events at Queen's University being one such example. And the screenshot evidence is troubling for the reasons I have already described.

[130] I do not, accordingly, simply accept on its face, the evidence given by Mr. Raycroft and, in particular, his bald denials that any of the things giving rise to the charges against him actually happened.

[131] When I arrive at the second limb of the *W.(D.)* analysis, I am required to acquit Mr. Raycroft if, in respect of the charges against him, having not accepted his testimony, I am nevertheless left in reasonable doubt by it.

[132] It is at this stage of the analysis that many of the submissions made by the defence in respect of the reliability of Ms. Raycroft's testimony, her motivation, and the loss of evidence gain traction. I have already referred to those factors extensively, and will not repeat them again.

[133] Although many of the concerns I have expressed about aspects of Ms. Raycroft's evidence and the Crown's case generally would not, viewed in isolation, be of great significance, they have a cumulative effect.

[134] When I look at the evidence as a whole, I find myself acknowledging the possibility that Mr. Raycroft's denials represent the truth. Such a conclusion does not mean that I necessarily prefer his word to that of Ms. Raycroft. It does not mean that I find him more credible than her. Nor does it mean that it is not possible that some of the incidents alleged by Ms. Raycroft to have occurred in fact happened. But, as I have already explained, the way that burden of proof and the standard of reasonable doubt operate in a criminal case requires me to be sure that Mr. Raycroft is guilty as charged.

[135] On my assessment of all of the evidence, applying as I must, the legal principles that I have explained, I am not sure, and my conclusion is therefore that the Crown has failed to discharge its onus of proving the guilt of Mr. Raycroft on these charges beyond a reasonable doubt.

[136] As a result, he must be acquitted on all charges.

Graeme Mew J.

Handed down: 19 October 2017 (orally)

CITATION: *R. v. Raycroft*, 2017 ONSC 6264

COURT FILE NO.: 14-571

DATE: 20171019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

ELMER RAYCROFT

Defendant

Handed down: 19 October 2017